

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

NO. 77-4119

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**UNITED STATES COURT of APPEALS
FOR THE SECOND CIRCUIT**

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

DISTRICT 1199, NATIONAL UNION OF HOSPITAL AND HEALTH
CARE EMPLOYEES, A DIVISION OF RWDSU, AFL-CIO,

Respondent.

**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

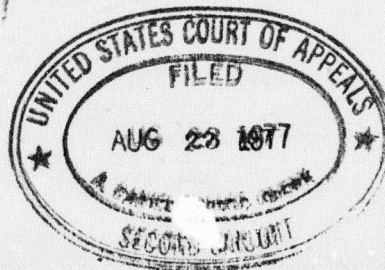
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STATEMENT OF THE ISSUE PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's finding that the Union violated Section 8(b)(1)(A) of the Act by: (1) threatening and assaulting nonstriking employees; (2) threatening nonstriking employees with property damage; (3) hitting, throwing liquids, and spitting upon the automobiles of nonstriking employees; and (4) blocking ingress to and egress from the struck premises.

STATEMENT OF THE CASE

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C., Sec. 151, et seq.), for enforcement of its order (A. 19-21) ^{1/} issued against Respondent, District 1199, National Union of Hospital and Health Care Employees, a division of RWDSU, AFL-CIO (hereafter, the "Union"), on January 31, 1977. The Board's decision and order are reported at 227 NLRB No. 250. This Court has jurisdiction of the proceedings, the unfair labor practices having occurred in Southport, Connecticut.

I. THE BOARD'S FINDINGS OF FACT

The Board found that the Union violated Section 8(b)(1)(A) of the Act by threatening and assaulting the persons and property of nonstriking employees of Southport Manor Convalescent Center, Inc. (hereafter, the "Company"), and blocking ingress to and egress from the struck premises. The Board's findings are based on the facts summarized below.

The Company is a Connecticut corporation engaged in the operation of a nursing home which provides health care and related services to the aged and infirm (A. 2). Its employees are represented by the

^{1/} "A." references are to the printed appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

Union (A. 2; 30). In August, 1975,^{2/} the Company and the Union began negotiations for a new collective bargaining agreement to replace an existing contract between them, which was due to expire on September 30 (A. 2-3; 30). During these negotiations the Union was represented by Kevin Doyle and his brother, Thomas Doyle, both regularly employed by the Union as staff organizers (A. 3; 29, 55).

Negotiations between the parties were not successful, and the Union commenced an economic strike on December 3 (A. 3; 53, 229). At that time a picket line was established at the premises of the Company, located approximately ten feet from the end of the driveway leading to the facility (A. 3; 51). The following day, as a van carrying nonstriking employees crossed the picket line to exit the premises, picketing employee Cora Bennett uttered obscenities at the nonstrikers and threw a cup of hot chocolate at the vehicle, which splattered against the closed rear window (A. 5-6; 92-94, 106-110).

On December 5, nonstriking employee Margaret Leko and three other workers were driven to work by Leko's husband. As they approached the picket line they stopped their vehicle to allow the line to open up, in order to gain access to the premises. At that point picketing employee Myrtle Nicholson, in the presence of Union Organizer Thomas Doyle, shouted at Leko and the others, "you're going to get yours" (A. 4; 114-117, 127-130). On the same day, as nonstriker Loren Sherman was driving his vehicle through

^{2/} All dates hereafter are 1975 unless otherwise indicated.

the picket line, Union Organizer Kevin Doyle stopped him and stated: "that's a nice truck you have there, Sherman. And I'm going to take care of it" (A. 5; 136-140, 146-149, 151).

On the morning of December 8, nonstrikers Barbara Crimley and Cathy Wright drove to work in Wright's car. Crimley was seated in the rear holding a cup of hot chocolate (A. 4; 178-181). As they approached the picket line their car stalled, and picketing employee Mary Hill reached through the car window and slapped Crimley across the face, causing Crimley to spill the hot chocolate on herself and Hill (A. 4; 178-181, 186-190, 195-204, 214-215). Kevin Doyle was also on the picket line at that time, standing immediately next to Hill (A. 4; 178-181, 186-190, 195-204, 214-215).

On December 17, employee Loren Sherman was transporting a group of other nonstriking employees to work in a van. As the vehicle passed the picket line, Kevin Doyle said: "Sherman, I'm going to kill you" (A. 5; 141-142). Sherman then dropped off his passengers and drove to the police station in order to file a complaint against Kevin Doyle (A. 5; 141-142). Another staff organizer employed by the Union, Marilee Millstein, followed Sherman to the station (A. 5; 142-143, 153-156, 166-168). Once there, Millstein chided Sherman about reporting the incident to the police, and while walking behind Sherman continually stepped on his heels (A. 5; 142-143, 153-156, 166-168). Later that day, Kevin Doyle stood in front of a car driven by nonstriker Rafael Garcia as

Garcia reached the picket line on his way out of the premises. Garcia's wife, also a nonstriking employee, was a passenger. Doyle struck the car with his hand while calling Garcia "garbage" and "marico," which Garcia understood to mean "homosexual" in the spanish language (A. 5; 56-59a, 72, 74).

On December 27, nonstrikers Barbara Crimley, Jean Carr and Emma Holman were leaving the Company premises at lunchtime in a vehicle driven by Carr. When they reached the picket line, Carr stopped the auto and striker Mary Fanueff stood in front of it (A. 6; 181-185). At that point, Kevin Doyle hit the side window with his fist (A. 6; 181-185). Carr then momentarily released the brake and vehicle rolled forward, slightly bumping Fanueff (A. 6; 181-185, 205, 211-214, 237-240).

On February 16, 1976, at about 12:45 p m., nonstriker Barry Jackson, a black employee, walked to the area near the picket line in order to clean up the driveway, which reportedly had been littered with glass and nails (A. 7; 33-34). Jackson was accompanied by Anne Meyer, Administrator of the facility (A. 7; 28, 33-34). As Jackson began sweeping the driveway Kevin Doyle started walking towards him and, while simultaneously uttering racial obscenities, kicked an empty soda can and milk carton in Jackson's direction (A. 7; 34-43). Jackson was not hit by the objects but he backed away as Doyle came closer (A. 7; 34-43). Shortly thereafter, non-strikers Rafael Garcia and his wife were leaving the premises in their car and were stopped at the picket line. Kevin Doyle again called Garcia "marico", and at the same time threw coffee and spit on the windows (A. 6; 59a-61, 79-80, 82-85). Picket Cora Bennett then threw a soda on the vehicle (A. 6; 59a-61, 79-80, 82-85).

Garcia attempted to drive through the line but a female picket stood in front of the car with her hands raised, saying "no, the people don't move" (A. 6; 62-63, 80, 88-89).

The following morning, nonstriker Nicholas Bonaiuto attempted to drive his vehicle through the picket line on his way to work, but his progress was blocked by Kevin Doyle. Doyle stood in front of the vehicle while picketing employees marched in circles ahead (A. 7; 170-174). Bonaiuto attempted to inch forward through the line but Doyle remained in front of the car with his hand raised, blocking Bonaiuto's entry (A. 7; 170-174). Bonaiuto then backed up slightly and waited (A. 7; 170-174). Again Doyle did not move, and the pickets continued to circle the driveway (A. 7; 170-174). At that point Bonaiuto, being unable to report for work as scheduled, backed completely out of the driveway and drove home (A. 7; 170-174).

On February 19, 1976, the Company's Recreation Director, Louise Rowe, drove her vehicle past the picket line on her way home from work (A. 7; 174-178). Nonstriker Louise Sherman, the mother of employee Loren Sherman, was a passenger in the car (A. 7; 174-178). After the vehicle cleared the picket line, Rowe stopped at the end of the driveway to wait for traffic to pass on the public road. Kevin Doyle came to the passenger side of the car and screamed at Louise Sherman: "We'll get you, Sherman" (A. 7; 174-178). Rowe then drove across the street to where a police car was stationed, in order to allow Louise Sherman to file a complaint about the incident (A. 174-178).

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on these facts the Board found that the Union violated Section 8(b)(1) (A) of the Act by the following conduct directed at non-striking Company employees: (1) threatening to kill and otherwise cause harm to employees; (2) assaulting employees; (3) threatening to cause damage to employees' automobiles; (4) coercing employees by hitting, throwing liquids, and spitting upon their automobiles; and (5) blocking ingress to and egress from the struck premises (A. 8-9, 18-21).

The Board's order requires the Union to cease and desist from the unfair labor practices found, and from "in any like or related manner" restraining or coercing employees in the exercise of rights guaranteed in Section 7 of the Act. Affirmatively, the order requires the Union to post appropriate notices ^{3/} at its offices and any other place where its meetings are usually held, and to mail signed copies of those notices to the Regional Director for posting at customary places on the premises of the Company (A. 8-9, 19-21).

3/ The notice attached to the Administrative Law Judge's recommended order contained a clause reciting that the Union would refrain from like or related conduct directed not only at the Company's employees, but also "employees of any other employer" (A. 10). However, since the Union was not found to have committed violations of the Act against persons employed elsewhere, the Board modified the notice to delete this language (A. 19-21).

ARGUMENT

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE UNION'S CONDUCT COERCED AND RESTRAINED NONSTRIKING EMPLOYEES, IN VIOLATION OF SECTION 8(b)(1)(A) OF THE ACT.

Section 8(b)(1)(A) of the Act makes it an unfair labor practice for a labor organization or its agents:

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7:
* * *

Section 7 provides, in pertinent part, that:

employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . .

In essence, Section 8(b)(1)(A) and Section 7, read in conjunction, guarantee to employees the right to engage in union activities or other protected concerted activities, including economic strikes, or to refrain from engaging in such activities, without fear of sanction, restraint or coercion brought to bear upon them by a labor organization. As the Supreme Court has observed, Section 8(b)(1)(A) "is a grant of power to the Board . . . to proceed against union tactics involving violence, intimidation, and reprisals or threats thereof--conduct involving more than the general pressures upon persons employed by the affected employers implicit in economic strikes." N.L.R.B. v. Local Union No. 639, Teamsters, 362 U.S. 274, 290 (1960).

The statement shows that the Union in this case resorted to a variety of such coercive tactics in an effort to compel nonstriking employees to support its cause. In nearly every instance, the conduct at issue was either the direct act of an admitted Union agent or the act of a picket; employee committed in the presence of Union agents. Thus, Union Organizer Kevin Doyle: (1) threatened to kill employee Loren Sherman, and to "take care of" his newly purchased van; (2) threatened employee Louise Sherman that "We'll get you"; (3) kicked objects and shouted racial obscenities at employee Barry Jackson; (4) struck the automobile of employee Jean Carr; (5) struck, threw liquids and spit on the vehicle of Rafael Garcia; and (6) prevented ingress to the facility by employee Nicholas Bonaiuto. In addition, Kevin Doyle stood by while picket Mary Hill assaulted employee Barbara Crimley and, during Doyle's own attack on Rafael Garcia's car, he was assisted by picket Cora Bennett as well as a third individual, who blocked Garcia's egress. Thomas Doyle, also a Union organizer, was present when picket Myrtle Nicholson threatened nonstriking employees that "you're going to get yours." And another organizer, Marilee Millstein, was responsible for an assault on Loren Sherman by stepping on his heels.

The Board, with court approval, has long found union conduct such as that present here--involving interferences with ingress and egress, threats, intimidation, and acts of violence against persons or property in the course of strike and picketing activity--to be violative of Section 8(b)(1)(A) of the Act. See, for example, N.L.R.B. v. Taxicab Drivers Local 777, Teamsters,

340 F.2d 905, 909 (C.A. 7, 1964); N.L.R.B. v. District 65, Retail, Wholesale and Department Store Workers Union, 375 F.2d 745, 746-747 C.A. 2, 1967); N.L.R.B. v. Dressmakers Joint Council, International Ladies' Garment Workers' Union, 342 F.2d 988 (C.A. 2, 1965), enforcing 146 NLRB 559 (1964); N.L.R.B. v. Union Nacional de Trabajadores, 540 F.2d 1, 7-10 (C.A. 1, 1976), cert. denied, 429 U.S. 1039; N.L.R.B. v. Local 140, United Furniture Workers of America, 233 F.2d 539, 540 (C.A. 2, 1956).

The record here clearly supports the Board's conclusion that the Union was legally responsible for all of this conduct. Obviously, the Union is chargeable with the direct acts of its staff organizers--Kevin Doyle, Thomas Doyle and Marilee Millstein--each its agents within the meaning of Section 2(13) of the Act (A. 4; 16, 27). But it is evident as well that the actions of pickets Mary Hill, Myrtle Nicholson, Cora Bennett, and the unnamed individual responsible for blocking Rafael Garcia's car on February 16, 1976, are also imputable to the Union. Each of these pickets engaged in misconduct in the presence of Union agents, who took no steps to remedy the situation. Rather, as noted above, Union agents actively participated in similar activities, thus indicating direct approbation of such conduct. Therefore, as the Union virtually conceded before the Board (A. 11-17),

the picket line misconduct of striking employees is also properly the Union's responsibility. ^{4/} N.L.R.B. v. District 65, Retail, Wholesale and Department Store Workers Union, supra, 375 F.2d at 746-747; N.L.R.B. v. Dressmakers Joint Council, supra; N.L.R.B. v. Union Nacional de Trabajadores, supra.

At the hearing in this matter before the Administrative Law Judge the Union elicited the testimony of only three witnesses, none of whom were directly involved in any of the conduct alleged or found to

^{4/} The Union argued before the Board that it was not chargeable with the acts of picket Cora Bennett on December 4, 1975--in throwing liquids on a car carrying nonstriking employees-- because there was no evidence that the Doyle brothers or Millstein were present at the time (A. 6, 14). This contention, however, ignores the well-established rule that when a union authorizes a picket line, it has an affirmative duty to police the activities of employees conducting the picketing. The Union's failure to repudiate and take positive steps to halt illegal activities engaged in by the pickets will make it accountable for those activities even though its agents had no direct participation. And this is especially so where, as here, union agents not only fail to take remedial measures but actually sanction such conduct by their own involvement in similar acts. New Power Wire v. N.L.R.B., 340 F.2d 71, 73 (C.A. 2, 1965); N.L.R.B. v. Bulletin Co., 443 F.2d 863, 867 (C.A. 3, 1971), cert. denied, 404 U.S. 1018. In any event, that portion of the Board's order directing the Union to cease "throwing liquids . . . on the automobiles of employees" (A. 8, 19-21) is fully supported by the other record evidence showing that Kevin Doyle and Cora Bennett threw liquids on employee Rafael Garcia's car on February 16, 1976.

constitute violations of Section 8(b)(1)(A) of the Act (A. 2-3). While these witnesses did give some testimony regarding their observations of certain incidents, the Administrative Law Judge did not credit that testimony (A. 2-3). In every other respect the Judge's findings of fact, as affirmed by the Board, rest on the credited and uncontradicted evidence given by the General Counsel's witnesses (A. 2-3, 18-19). Accordingly, to the extent that the Union contends that the Board's order should be denied enforcement due to alleged error in the assessment of credible testimony, its argument is patently without merit. There is nothing in the record here to justify a departure by this Court from its well-settled rule that the Board's credibility findings are entitled to affirmance unless "hopelessly incredible." N.L.R.B. v. Columbia University, 541 F.2d 922, 928 (C.A. 2, 1976).

As a justification for its failure to adduce the testimony of other witnesses, the Union represented to the Administrative Law Judge that certain of its agents and members were facing state criminal charges arising out of the same conduct alleged in the complaint. Then, without naming all such persons allegedly charged, the Union declined to call any other witnesses--informing the Judge that to do otherwise would subject those persons to a compulsory waiver of their privilege against self-incrimination (A. 216-225, 314-315). Instead, the Union moved for a continuance of the hearing to an unspecified later date when all criminal charges would be disposed of, claiming that only then could it present an adequate defense to the complaint (A. 216-225, 314-315). The motion,

however, was denied.

The Board properly found that the Administrative Law Judge did not abuse his discretion in making this ruling (A. 18-19). The Board's Rules and Regulations, Series 8, (29 C.F.R.) Section 102.31, provides an established procedure whereby any party in a Board proceeding may subpoena witnesses and move for the issuance of an order compelling the testimony of a witness who refuses to answer questions on self-incrimination grounds. Such an order, if issued, would grant use immunity to a witness consistent with the provisions of the Organized Crime Control Act of 1970, 84 Stat. 926, 18 U.S.C., Section 6001, et seq. Otherwise, in the absence of such an order, the Board's rules provide that any witness asserting the privilege may not be compelled to testify. By its disregard of this procedure here, the Union improperly anticipated the testimony of its prospective witnesses and, in essence, asserted for its own use a privilege personal to them alone. Moreover, the ground for the Union's motion--namely, that calling the witnesses would subject them to a compulsory waiver of the privilege--is unfounded since, as the Board noted, under the rules no witness could be compelled to waive the privilege against self-incrimination in the absence of a grant of immunity. Therefore, the denial of a continuance was proper, and in no event an abuse of discretion.

Before the Board, the Union took exception to the Administrative Law Judge's conclusion that certain incidents of misconduct were violative of the Act, even on the facts as he found them. With respect to two such incidents--Marilee Millstein's assault on Loren Sherman and the confrontation between Kevin Doyle and employee Barry Jackson on February 17, 1976--the Union contends that no violation is established because neither Sherman nor Jackson were shown to have been actually coerced. However, this argument has been consistently rejected by this Court and other courts, which have held that the test is not whether misconduct proves effective, but whether it reasonably tends to be coercive under all the circumstances.

N.L.R.B. v. Local 140, United Furniture Workers of America, supra;
Local 542, Operating Engineers v. N.L.R.B., 328 F.2d 850, 852-853
(C.A. 3, 1964), cert. denied, 379 U.S. 826, and cases cited therein.

When viewed against this standard, the record adequately supports the Board's finding of violations of the Act regarding both of these incidents.

The Union further argues that several instances of threats to nonstriking employees involved only ambiguous statements, which could not be coercive. Included here are Kevin Doyle's threat to "take care of" Loren Sherman's van; Doyle's threat to Louise Sherman that "we'll get you, Sherman"; and Myrtle Nicholson's threat to nonstrikers that "you're going to get yours". We submit, however, that each of these statements was reasonably coercive under all of the circumstances and that the Board properly so found. This is not, after all, a case in which the Union's misconduct is limited to mere words. The record here

shows a pattern of intimidation directed at nonstrikers in which threats were often accompanied, either immediately or shortly thereafter, by physical assaults on persons and property. Moreover, the direct involvement of admitted Union agents in nearly every incident belies the notion--inherent in the Union's argument-- that each act of misconduct was but an isolated example of individual excess, unconnected with others. This is especially so with the actions of Kevin Doyle, who directed a series of threats against Loren Sherman and, somewhat later, to Sherman's mother, Louise. Against this background, each threat alleged to be "ambiguous" by the Union was plainly coercive, given the overall context in which it was made.^{5/}

^{5/} Indeed, even Myrtle Nicholson's threat to nonstriker Margaret Leko and others that "you're going to get yours" was not without a coercive background. The credited evidence shows that Thomas Doyle was present when this statement was made, and that he was also present during a Union meeting held in late November, 1975, when a strike vote was taken (A. 3; 113-114). Significantly, at that meeting nonstriker Leko was threatened by another employee that her "arm would be broken" if she voted against the strike (A. 3; 113-114). The Administrative Law Judge found that Thomas Doyle overheard this remark and took no action to disavow it (A. 3-4). Nevertheless, the Judge did not find a violation of the Act in this incident because the evidence was insufficient to establish direct Union responsibility for the threat (A. 3-4).

Finally, the Union contends that the Board erred in finding a violation of the Act from Kevin Doyle's statement to Loren Sherman that "Sherman, I'm going to kill you." But unlike its argument concerning other threats by Doyle to Loren and Louise Sherman--which the Union characterizes as "ambiguous"--it claims that this threat was insignificant because it was assertedly a product of personal hostility between these men, arising from their exchange of epithets during the course of the picketing. The record, however, lends no support to this view. While Sherman did exchange profanities with Doyle and others on several occasions as Sherman passed through the picket line, there is no evidence that Sherman's remarks were directed particularly at Doyle to the exclusion of the others and no indication that these men had any resulting personal animosity between them which transcended the issues posed by the strike (A. 157-169). Rather, as Sherman testified, he cursed at Kevin Doyle and others simply because he had previously been subjected to like conduct on the part of many of the pickets (A. 157-169). And even assuming that Sherman's language was otherwise provocative to those on the picket line, it can hardly be contended that his conduct justified that of Doyle, who made nothing less than a direct threat on Sherman's life. In sum, the record simply fails to suggest that Doyle threatened Sherman for any reason other than the obvious--to coerce Sherman into abandoning his job of transporting nonstriking employees across the picket line.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a judgment should be entered enforcing the Board's order in full.

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Respondent.)

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's
brief ^{and} Appendix in the above-captioned case have this day been served by
first class mail upon the following counsel at the address listed below:

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Dated, at Washington, D. C.

this 22nd day of August, 1977.